United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1132

ORIGINAL

To be argued by
ARLEN S. YALKUT

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

CHARLES BROOKS,

Appellant,

and

VIRGIL ALESSI, ANTHONY PASSERO, JOHN D'AMATO, LAWRENCE IAROSSI, a/k/a "Big Lou", JAMES PANEBIANCO, a/k/a "Jimmy Feets", GRAZIANO RIZZO, a/k/a "Ju-Ju", LEONARD RIZZO, a/k/a "Lennie", JOSEPH BARONE, a/k/a "Frankie", FIORE RIZZO, PATSY ANATALA, a/k/a "Bock", SNIDER BLANCHARD, a/k/a "Jap", WILLIAM HUFF and RENATO CROCE a/k/a "Rene",

Defendants.

Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FILED
AUG 10 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

(9790)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

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QUESTIONS PRESENTED

1. Whether the evidence was insufficient as a matter of law to convict the Appellant of the crime of conspiracy.

2. Whether the evidence adduced at trial failed to establish a single conspiracy, but rather offered proof of multiple conspiracies some of which were totally unrelated to the Appelant which was prejudicial and denied the Appellant a fair trial.

3. Whether the Court erred in denying the Appellant's motion for a severance pursuant to Rules 8(b) and 14 of the Federal Rules of Criminal Procedure.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X
Docket No. 76-1132
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UNITED STATES OF AMERICA,

Appellee,

- against -

CHARLES BROOKS,

Appellant.
----------X

On Appeal From The United States
District Court For The Southern
District of New York
----------X

BRIEF FOR THE APPELLANT

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Dudley B. Bonsal, Presiding) rendered on March 24, 1976, wherein the Appellant, Charles Brooks, was convicted after a trial by jury of conspiracy to violate Sections 812, 841(a)(1) and 841(b)(1)(A) and one substantive count of distribution.

The Appellant was sentenced to the care and custody of the Attorney General for a period of three years with a special parole term of three years to commence upon the expiration of the term of imprisonment.

The Trial Court has permitted the Appellant to be released on bail pending the determination of this appeal.

STATEMENT OF FACTS

A twenty-three count indictment was filed charging the Appelant, Charles Brooks, in Count I of conspiracy to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code, to unlawfully, intentionally and knowingly distribute and with intent to distribute Schedule I and II narcotic drug controlled substances. The Appellant was further charged in Count 13 with having distributed a Schedule I controlled substance, to wit, approximately one-half kilogram of heroin.

The indictment alleged that from January 1, 1968, up to and including June, 1973, that the Appellant, in conjunction with other named defendants and co-conspirators, conspired to facilitate the distribution and possession with intent to distribute Schedule I and Schedule II narcotic drug controlled substances.

THE TRIAL

THE PROSECUTION CASE

MARY MOBLEY testified that she was age 24 and lived in Pittsburgh, Pennsylvania. (28) She had been convicted for possession of heroin and marijuana in 1971 and received a one-year probation sentence. She also received a three-year probation sentence on a burglary charge. Additionally, she was sentenced to ten days in jail with nine months suspended plus three years probation for forgery in the State of California. (32)

She testified that she still had three outstanding charges pending against her, two for forgery and one for armed robbery. (33)

Mobley testified that in August, 1968, she met Alvin Clark

who gave her some money and flew to New York with her. (36) They returned to Pittsburgh the same evening. At the airport, Clark gave her a package which she placed in her purse. In the bathroom on the plane she opened the package and tasted part of its contents and she knew it was heroin. (37)

Prior to this incident, she testified, she had been using drugs for six years. She took an ounce out of the package which she asserted contained one-eighth of a kilo. (38)

She testified that she made many subsequent trips to Kennedy and Newark airports to pick up narcotics. (41) Mobley testified that she came to New York with Alvin Clark at least ten times to pick up packages beginning in 1968.(47-48) Mobley stated that she met Big Lou* at a Holiday Inn at Laguardia Airport. (51) Mobley testified that she received packages containing between one-eighth of a kilo up to a kilo.(53)

Mobley testified that Clark gave her money when she went to New York alone and that she kept half of the money for herself. (54) Mobley stated that she was supposed to pay out all of the money. (54) Occasionally the persons in New York would question the amount of money, but Mobley would tell them that Clark would send the rest. (55)

In the winter of 1968, Big Lou introduced Mobley to Ralphie.**

Numbers refer to transcript page numbers
* Big Lou Later identified as Lawrence Iarossi.
** Ralphie later identified as Joseph Manfredonia.

Mobley stated that she returned to New York every two to three weeks depending upon how fast Clark sold the packages she received. (58)

Mobley testified that she employed various aliases including Vibins, Wilson and Scott. She also stated that she would take an ounce or so out of each of the packages and cut it up to 16 times and sell it. (61)

In the summer of 1970, Mobley testified, she met Gu Gu* in pittsburgh at the grand opening of the Dog & Burger hot dog shop. (64) Subsequently, Mobley met Gu Gu when she came to New York and he delivered packages to her. (66) She picked up packages from Gu Gu from the summer of 1970 until the summer of 1971. (68) In August, 1971, Mobley went to jail and did not pick up any more packages for Clark.

Mobley testified that about two weeks after she met Gu Gu, she was introduced to Lennie** by Alvin Clark. This occurred at the Dog & Burger. (70) Mobley stated that she had a three hour argument with Lennie which Mobley asserted Lennie started by saying about her " who is that bitch" before they were even introduced. (70)

An identification hearing was conducted without the presence of the jury. At the hearing, Mobley stated that she became a co-operating witness with the Government in 1974. (72)

Mobley stated that she came to the United States Attorney's Office several times and was shown 25 to 30 photographs. (75) She picked out Big Lou, Ji-Ji***, Frankie ****, Ralphie, Gu Gu and Rene. *****(79-81)

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* Gu Gu later identified as Graziano Rizzo. He plead guilty and did not stand trial.
** Lennie later identified as Leonard Rizzo.
*** Ji Ji identified as Louis Inglese, not indicted.
**** Frankie later identified as James Barone.
*****Rene later identified as Renato Croce.

Mobley asserted that she met Lennie about 10 to 15 times or more. On one occasion Lennie Allegedly offered her $1,000. to go to a hotel with him but she refused. (87) Mobley stated that she met Lennie from the summer of 1970 until August, 1971. (87) She also claimed to have met with Big Lou from 1968 until 1970. (88) She met with Palphie about 20 times. She met with Frankie ten times. Mobley stated that she met with Rene on one occasion. (88)

With the jury present, Mobley identified Leonard Rizzo, Lawrence Iarossi and Renato Croce as Lennie, Big Lou and Rene, respectively.

On cross-examination, Mobley testified about the various crimes for which she had been arrested and about the three state charges still pending against her which she stated the Government had agreed to assist her with. (200-206) She had been arrested 21 times. She testified that she had been receiving $620.00 per month from the Government since 1975. (206) She was arrested in San Francisco for forgery while she was a co-operating witness. (212)

Mobley stated that she was at various times physically and mentally dependent on heroin and had lied for the purpose of obtaining drugs. (255) She had been addicted to heroin, cocaine, morphine and dilaudid. (310)

Mobley could not recall or even approximate how many times she made drug pick-ups in New York. (339)

In 1974, Mobley had originally stated that Palphie was with Lennie in 1970, instead of Croce.At trial, she indicated that she had been previously mistaken. (344)

Mobley did not testify about or in any way implicate the Appellant Brooks.

ANTHONY MANFREDONIA testified about his criminal record and his drug dealing dating from 1966. (375-382) In 1966, he stated that he met Snider Blanchard who he described as one of his customers. He testified that he and Iarossi were partners and that they dealt with Vincent Papa and Jack Lolorrieri. (395) From 1967 until 1969, Blanchard, Alvin Clark, Mary Mobley and " a guy named Socks" were his customers. (401)

Manfredonia testified about meeting Panebianco in 1968 or 1969. (410) Manfredonia stated that Panebianco was an alternate source of drugs when he couldn't get any from Papa in Queens. (415) Manfredonia stated that in his dealings with Clark, he and Iarossi would fly to Pittsburgh to deliver heroin and return with $10,000. to $13,000. (419) Manfredonia stated that Simonetti and Virgil Alessi made deliveries to Clark in 1969. (423)

Manfredonia described his operation involving Papa, Alessi, Tony Passero and Frank D'Amato. (441)

Manfredonia testified that in 1971 Barone introduced him to the Appellant, Charles Brooks. (451) Manfredonia stated that he met Brooks on 116th Street on the West Side. (452) Barone had purportedly told Manfredonia that he had previously delivered two kilos to Brooks and that Brooks owed him money for them.(452)

Manfredonia stated that he met Brooks in front of a liquor store and that Barone told him that Brooks had an apartment over the store. (453) Brooks allegedly gave Barone $28,000. Manfredonia and Barone returned to the same location a few days later where Barone brought a package to the liquor store and returned with money. (454) Manfredonia never saw Brooks again after that occasion. (454)

On cross-examination, Manfredonia testified about his arrests for flim-flams in Rockland County in 1973, while he was on probation in New Jersey on similar charges. (508)

Manfredonia stated that he would do " almost anything" in order to stay out of jail. (513) Manfredonia lied to the United States Attorney about his employment in 1975 in the hope of getting a low bail. (513-514) Manfredonia used $4,000. given to him by the Government to get back jewelry he had previously hocked. The jewelry had originally been purchased with the proceeds from drug deals. (518)

Manfredonia testified that his partner in the drug business from 1967 to 1970 was Mr. Iarossi. (619) In late 1970 Barone became his new partner. Manfredonia never met Mr. Brooks before 1971 when Barone introduced him. (619)

Manfredonia admitted that he had not told the Grand Jury the truth on July 22, 1975 when he stated that Brooks had been his customer. (619) Manfredonia also acknowledged that he misinformed the Grand Jury when he testified that Iarossi had dealt with Brooks when such was not the case.

Manfredonia stated that any information he learned about Brooks, with the exception of the first meeting in 1971, came from Barone and was not first-hand. (624) At the second meeting, Manfredonia allegedly gave heroin to Barone who then met Brooks in front of the liquor store. Brooks and Barone went upstairs. Manfredonia did not personally observe Barone give heroin or anything else to Brooks. (626)

THOMAS MURRAY testified that he was twenty-six years of age. (677) Murray was previously convicted of burglary and had pleaded

guilty to distribution of heroin in 1975. (677) Murray testified that he worked for Josph Barone in loan sharking and picked up envelopes of money from him in 1968. (678)

Beginning in 1969, Murray delivered packages for Barone. Murray used the name "Bruno" when he engaged in these transactions. Murray described drug deals involving G.T. Watson. (681)

Murray stated that he met Al Manfredonia in the beginning of 1970. Manfredonia asked Murray to make deliveries to Pittsburgh. (683) Murray made deliveries to Al Pitts in Pittsburgh. (687)

Murray made an in-court identifcation of the Appellant, Charles Brooks. (693) Murray stated that he had previously met Mr. Brooks on instructions from Mr. Barone. Murray could not remember what year the meeting took place. (695) The meeting allegedly took place at Gunhill Road in the Bronx. Barone purportedly gave Brooks a package and Brooks handed Barone some money. (695) This incident, Murray testified, occurred in 1970 after he met Manfredonia. (696)

Murray testified that Barone telephoned the Alexander's bar and asked for Mr. Brooks. (697) A woman answered the telephone. Barone later met Brooks. Barone told Murray he had given Brooks a package. (698)

Murray next met Brooks in late 1974 or early 1975. (699) Murray asked Brooks if he still would do business, but Brooks purportedly replied that he could " get it cheaper elsewhere." (699)

Murray testified to drug transactions involving Anatala and Huff. (709-712)

On cross-examination, Murray testified that he had not yet

been sentenced on the narcotics charge. (725) Murray admitted that he lied several times to Mr. Lavin, one of the Government prosecutors. (726)

Murray acknowledged that charges against him for selling six kilograms of heroin were to be dismissed in return for his co-operation. That the Government had agreed not to prosecute him on that charge. (732)

Murray admitted that he had previously told Lavin that he had never gone to Pittsburgh when, in fact, he went there three times for Barone. (733)

Murray acknowledged that he never made a transaction with Brooks. (734)

CHARLES IRISINA, employed by the N.Y.C. Police Department, testified regarding surveillance of the Scotts Pub in Queens. (774) He testified about a seizure of 34 pounds of heroin. (792) The heroin was found in the apartment of Louis LeSerra in a closet. LeSerra was not a named defendant at the trial. (818-819)

The Court instructed the jury that the Government's theory was that the Queens drugs was a stash maintained by the conspiracy. The Court advised the jury that no evidence had been elicited that any of the defendants were ever present at the stash. This evidence was taken subject to connection. (824)

FORTUNATO deLUCA, employed by the N.Y.C. Police Department, testified regarding the surveillance of Scotts Pub in Queens. He described the seizure operation at 46-01 39th Avenue, Apartment 106. (827-830)

WILLIAM O'ROURKE, employed by the N.Y.C. Police Department, testified that John D'Amato entered the building at 39th Avenue shortly before the seizure was made. (835)

THOMAS HOUSTON, employed by the N.Y.C. Police Department, testified that he observed Frank D'Amato, John D'Amato and Virgil Alessi at Scott's Pub during his surveillance. (840-41)

RALPH NIEVES, employed by the N.Y.C. Police Department, testified that he was an undercover operative in a case involving a person named Collin Carroll, in the Northeast Bronx. (847) This occurred during November and December, 1972. Nieves purchased a $70.00 sample of heroin from Carroll on November 15, 1972. On November 27, Nieves bought one ounce for $1,500. (847) On December 12, 1972, an additional purchase of one ounce for $1350.00 occurred. All these transactions occurred in the vicinity of the Partners Shell Service Station at 222nd Street and Eastchester Road. (848)

A person named Nevado was the alleged source of supply for Mr. Carroll.

On January 17, 1973, Nieves went to the service station after having negotiated to purchase an eighth of a kilo for $4,500. Nieves paid $2,000., Carroll left the service station with Mr. Nevado and returned with the eighth of a kilogram. Nieves then paid the additional $2,500. (849)

On February 6, 1973, Nieves met Carroll at his house and they drove in separate cars to the service station. At the service station, Nieves observed a blue Toronado bearing plate number 3347-BC. In the office area of the station, Nieves observed Renato Croce in conversation with Mr. Nevado and another individual named Graziano Rizzo. (850) Nieves did not know Croce or Rizzo at the time. Nieves made an in-court identification of Croce. (850)

When they arrived at the service station Carroll exited his

car, went to Nieves' car and asked him for $9,500. Nieves gave Carroll $2,000. Carroll went into the service station and returned. Carroll told Nieves that Nevado did not want to do business because the feds were around. During this time Mr. Croce and Mr. Rizzo left the station, entered their car and left the area. (851)

Nieves told Carroll that he wouldn't do business and for his $2,000. back. Carroll only had $1,000. since he had given Nevado $1,000. Nieves told Carroll to go back into the station and get the rest of the money. Carroll said he would try to get the quarter kilo. (851-852)

Carroll went to the station and upon his return stated that Nevado would do business. Nevado and Carroll left the station and returned with a manila envelope containing a large glassine envelope with white powder. Nieves told Carroll that the balance of the money was in the trunk of his car. (852) When Nieves went to his trunk, Mr. Carroll and Mr. Nevado were arrested and Nieves was placed under simulated arrest. (852)

On cross-examination, Nieves testified that he never purchased heroin from Mr. Croce nor did he give Croce any money. (860) Nieves stated that Mr. Croce was not present at any of the November or December transactions. (861) Further that no marked or serialized money was recovered or found on Mr. Croce. (864) Nieves did not receive any narcotics from Croce on February 6, 1973. Nieves admitted that other people had entered the office of the service station and that the station was open for normal business transactions. (866)

ARTHUR DRUCKER, employed by the N.Y.C. Police Department, testified about the surveillance of Mr. Nevado's residence and at

place of his employment. (869)

Drucker testied about his observations of Croce and Graziano Rizzo on January 16, 1973. (871) He testified as to subsequent observations made on January 31, and February 6, 1973, culminating in the arrest of Croce and Rizzo. (872-877) His testimony in covered at length in the brief of the defendant Croce.

ROBERT BENSON, employed by the DEA as a Special Agent, testified as to the arrest and detention of Croce and Graziano Rizzo. His testimony is covered in the brief on behald of defendant Croce.

C. ROBERT ELLIS, employed by the Bell Telephone Company of Pennsylvania, testified regarding New York toll calls. (972-973)

EDWARD McDONNELL, a N.Y.C. Polce chemist, testified as to the analysis of drugs seized in connection with the D'Amatos. (975-979)

ANTHONY FONSECA testified as to his analysis of the narcotics purchased from Mr. Carroll Collins. (998-1007)

ARTHUR CARTER, JR., employed by the DEA as a Special Agent, testified regarding the Manfredonia investigation. (1018) He testified to transactions involving Joseph Barone and G.T. Watson at the New Kentucky Riding Stables in the Bronx in April, 1972. (1047-1048) Carter describe his surveillance of Barone and Patsy Anatala. (1073)

Carter testified regarding his questioning of James Panebianco after that defendant's arrest. Panebianco denied any knowledge of Graziano Rizzo. (1076)

Carter did not mention or involve the Appellant Brooks in any way.

Carter's testimony is set forth in greater detail in the briefs of the defendants Panebianco and Iarossi.

WALTER JENKINS, employed as A Special Agent for the DEA, testified regarding the surveillance of Joseph Barone on March 25, 1972 at Stilwell Avenue in the Bronx and to subsequent surveillance of Barone in April of that year. (1198)

JOSEPH FALSETTI, previously employed by the BNDD, testified that in April, 1972 he was involved in an investigation with Agent Carter. (1204) The surveillance involved Joseph Barone and Fiore Rizzo. (1207)

GLADSTONE GRIFFITH, employed as a forensic chemist by the DEA, testified and was qualified as an expert. (1216) He testified regarding the analyses of various Government exhibits and their compositions. The percentages of narcotics in each exhibit varied from each other. (1219-1221)

FALSETTI was recalled to testify regarding the chain of custody of certain exhibits. (1232)

The Government rested its case.

The Appellant renewed his motion for a severance.

THE DEFENSE CASE

MARIANNE RIZZO testified on behalf of the defendant Leonard Rizzo. (1347) Her testimony is set forth in the brief on behalf of Leonard Rizzo. (1355)

LEONARD RIZZO testified in his own defense. His testimony is set forth in the brief on behalf of Leonard Rizzo. (1387-1416)

DANIEL CHARLES BROOKS, the Appellant, testified on his own behalf. Brooks stated that he was 52 years of age and was born in North Carolina. (1417) He completed high school in Carolina and came to the New York area in 1945. (1417) Brooks testified that he was presently divorced and had two adult children who were married. (1418)

Brooks stated that he was a duly licensed beautician and barber. (1418) He was presently unemployed since July, 1975. In 1972 he owned a bar in Mount Vernon which since went bankrupt and a liquor store, Melody's Wine and Liquor, at 120 West 116th Street. (1419) Prior to that Brooks owned at various times two beauty parlors and a barbershop. (1420) Brooks has been a beautician for over 25 years. (1421)

Mr. Brooks testified that he had been arrested twice, once in 1973 for possession of a fictitious driver's license and again in 1974 for refusing to accept a marshal's dispossess notice when he couldn't pay his rent. (1422)

Mr. Brooks testified that he never met or even heard of Manfredonia before Manfredonia testified in court. Brooks stated that he had previously met Joseph Barone who he knew only as "Frankie" and hadbeen introduced to him by G.T. Watson. Brooks had been the hairdresser for G.T. Watson's ex-wife for about eight years and had met Mr. Watson at Brook's beauty shop. (1423)

Brooks stated that he knew Mr. Watson but had no business or social dealings with him. (1424)

Brooks testified that "Frankie" lent money to him on several occasions on Watson's recommendation. (1425) Brooks denied ever buying heroin from Joseph Barone. (1425)

In 1971, Barone came to Brooks' apartment because Brooks was six weeks behind in his loan repayments. (1425)

Brooks testified that he met Thomas Murray at Alexander's Cocktail Loungs (Brooks' bar) when Murray inquired about Brooks' late payment of outstanding loans. (1426)

Brooks stated that, prior to this trial, he never knew or heard of Panebianco, Leonard Rizzo, Iarossi, Anatala, Croce,

Blanchard, Mobley or any of the agents who testified at the trial. (1426-1427)

Brooks stated that he was arrested by an officer named Artie Russo on this case. (1427) Russo had employed a ruse by pretending to be interested in buying Brooks' bar. (1429)

Brooks denied knowing Vincent Papa, Anthony Loria, Louis Inglese, Frank Pugliese, Frank D'Amato, Charles Simmons or Alvin Clark. (1430) Brooks denied possessing heroin in 1971 as charged in the indictment or at any other time. (1431)

On cross-examination, Brooks testified that he earned from $200. to $400. a week as a beautician. (1433) He did processing work, hair straightening, and his business fell off sharply starting in 1968 because of the popularity of the Afro hair style. (1435) Brooks explained that he owned different businesses at different times. (1437)

Brooks borrowed money from his brother and from the juke box man in order to purchase the Alexander's bar in Mount Vernon. (1440) The bar was licensed through a corporation of which Brooks was president. (1443)

Brooks denied ever meeting Mr. Murray and Mr. Barone at Gunhill Road in the Bronx. (1452) He did not remember ever meeting Murray at Brooks' liquor store at 116th Street. (1452) Brooks acknowledged that Barone came to the store to collect loan payments several times. (1453) Brooks specifically denied ever giving Barone $28,000. at his liquor store. (1454)

The Appellant Brooks rested his case.

POINT I

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO CONVICT THE APPELLANT OF THE CRIME OF CONSPIRACY

Prior to the submission of the case to the jury, counsel for the Appellant Brooks moved for a verdict of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The motion was denied. This was error because a reasonable mind could not fairly conclude guilt beyond a reasonable doubt with respect to the charge of conspiracy or the substantive count and the judgment of conviction should be reversed and the indictment dismissed. United States v. Fantuzzi, 463 F.2d 683 (2nd Cir. 1972): United States v. Geaney, 417 F.2d 1116 (2nd Cir. 1969); United States v. Taylor, 464 F.2d 240 (2nd Cir. 1972).

With respect to the conspiracy count, the only witnesses against the Appellant Brooks were Manfredonia and Thomas Murray. Manfredonia, by his own admission, would do or say anything to stay out of jail. Manfredonia admitted to engaging in con games as well as narcotics trafficking.

Manfredonia's testimony against Mr. Brooks consisted primarily of the hearsay information which Manfredonia asserts he received from Joseph Barone. Manfredonia stated that he was introduced to Brooks by Barone and told that Brooks owed Barone $28,000. for several months. Brooks supposedly paid the money to Barone, but Manfredonia never asserted that the money was counted in his presence. The only other contact with Brooks was a few days later when Manfredonia and Barone supposedly went to deliver either one-falf kilo or possibly only four ounces of heroin to Brooks. Manfredonia never witnessed any

of narcotics between Barone and Brooks and would have had only Barone's word for what actually transpired in Brooks' apartment. Manfredonia never saw Brooks again after that week in the summer of 1971.

Furthermore, there was no evidence presented whatsoever to connect Brooks to Manfredonia's prior associate Iarossi. Manfredonia admitted lying to the Grand Jury which handed up the indictment. Manfredonia had told that Grand Jury that Brooks was his customer (not Barone's) and that Brooks had dealt with Iarossi. None of this was true.

Thomas Murray's testimony rested also in large measure on representations made to him allegedly by Joseph Barone. Murray did not personally engage in any transactions with Brooks involving narcotics.

The Government never disputed the fact that Barone was engaged in a large scale loan-sharking operation. Murray's testimony confirms this fact. The Appellant, Brooks, explained the circumstances under which he met "Frankie" and the subsequent meetings which took place when Brooks was unable to make timely payments to his shylock, Barone.

Murray's purported meeting at which he asked Brooks whether he still wanted to do business was equivocal at best. The subject of narcotics was never mentioned. Brooks supposed remark that he could " get it cheaper elsewhere" could have referred to obtaining a loan rather than the implication that narcotics were involved.

This Court held in the case of United States v. DeNoia, 451 F.2d 979 (2nd Cir. 1971) that:

> " For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate federal

narcotics laws, there must be independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy, or the single act must be one from which such knowledge may be inferred. United States v. Agueci, 310 F.2d 817-826 (2 Cir. 1962); United States v. Aviles, 274 F.2d 179, 189 (2 Cir. 1960)"

Even if Manfredonia's account of the delivery of the $28,000. was found worthy of belief, such an act would not support the inference of knowledge of a broader conspiracy. United States v. Stromberg, 268 F.2d 256,267 (2d Cir. 1959); United States v. Peina, 242 F.2d 302,306 (1957).

Murray's testi was unworthy of belief, and highly contradictory to that of Manfredonia's. Murray puts the alleged transaction at Gun Hill Road in early or mid 1970. After he asserts that it occurred after he met Manfredonia. He asserts that Manfredonia and Barone had a relationship in early 1970. Manfredonia stated that he was not involved in drugs from March until October, 1970, and only started his relationship with Barone after the latter date.

Also curious is the fact that the Government's bill of particulars listed the transaction under the Thirteenth Count of the indictment as occuring " in or about the summer of 1971 (exact time and date unknown) in an apartment located above a liquor store in Manhattan (address unknown)." Nevertheless, Manfredonia's memory, apparently and remarkably refreshed, states that the store was at 116th Street and was named Melody Wine and Liquor.

The testimony relating to the Collins-Nevado transactions as well as the Pittsburgh and Baltimore transactions, and the Scotts Pub incidents were never related to the Appellant in any way. The remaining evidence was insufficient to mark the Appellant as a participant in a conspiracy.

It is submitted that not only is the non-hearsay evidence insufficient as a matter of law to make Brooks a member of the alleged conspiracy by a fair preponderance of the credible evidence, but that, all the evidence, hearsay and non-hearsay, is legally insufficient to make Brooks a member of any conspiracy involving Iarossi, Manfredonia and Barone by proof beyond a reasonable doubt.

POINT II

THE EVIDENCE ADDUCED AT TRIAL FAILED TO ESTABLISH A SINGLE CONSPIRACY. PROOF OF MULTIPLE CONSPIRACIES SOME OF WHICH WERE TOTALLY UNRELATED TO THE APPELLANT WAS PREJUDICIAL AND DENIED THE APPELLANT A FAIR TRIAL.

The Government failed to establish the existence of a single conspiracy beyond a reasonable doubt. At best the proof established a series of smaller conspiracies and as such the conspiracy count should not have gone to the jury. United States v. Miley, 513 F.2d 1191 (2nd Cir. 1975).

In United States v. Sperling, 506 F.2d 1323 (2nd Cir. 1974), the Circuit Court gave warning to the Government that henceforth the haphazard linking of multiple conspiracies to form one overall conspiracy with the consequence that large numbers of individuals are tried together would be strongly scrutinized by the Court. The remedy would be the dismantling of the "single conspiracy" into its component parts so that the individual defendants would be spared the prejudicial effects of "spillover" from the more culpable participants. Subsequently, in the case of United States v. Miley, supra, the Government was again warned against the unnecessary and prejudicial joinder of defendants solely for the purpose of trying large number of persons together in the guise that they were participants in a single conspiracy.

Finally, in the case of United States v. Bertolotti, 529 F.2d 149 (2nd Cir. 1975) the Circuit Court, taking the bull by the horns, reversed and remanded the conviction of the defendants after making a specific finding that the proof

established the existence of a series of smaller conspiracies rather than the single conspiracy alleged by the Government. The Court found that the only common factor linking the transactions in Bertolotti was the involvement of two participants, Possi Corraluzzo. The Court concluded that such a linkage failed to establish a sufficient nexus to any real organization, even a loose one. Kotteakos v. United States, 328 U.S. 750, 90 L.ed. 1557 (1946).

In the instant case, even the tenuous connection found by the Bertolotti court is absent. The Government theorized that the kingpin in the alleged conspiracy was Lawrence Iarossi working together with his partner Joseph Manfredonia. In 1970, Iarossi was imprisoned and ceased any connection with the alleged conspiracy. Manfredonia, in his own testimony, stated that he too withdrew from the narcotics business from March, 1970 until October, 1970.

Upon his reentry into the business, Manfredonia allegedly took on a new partner, Joseph Barone. The Government offered no evidence whatsoever that the Appellant Brooks had any involvement with the Iarossi led conspiracy. Indeed, the only link suggested is based upon the hearsay evidence elicited from Manfredonia and Murray as to what Barone told them several years ago. Barone himself did not testify at the trial.

It is undisputed that the Government cannot in any fashion connect the Collins-Nevado episode with the Appellant Brooks The Government does not establish, or even try to establish, that the narcotics involved with Nevado-Collins deprived from the same source in the Manfredonia conspiracy. The chemical analysis of the various exhibits establish that

the percentage concentration of narcotics is different in each of the exhibits. Parenthetically, since no narcotics were ever recovered which could be connected with the Appellant in any way, no analysis of any such narcotics was ever performed.

The Government placed heavy emphasis upon the seizure of 34 pounds of narcotics from the Queens apartment of Louis LeSerra. The evidence failed to establish that any of the alleged conspirators on trial had ever been present at the site of the stash. The prejudicial effect on the jury, however, was undoubtedly substantial. Under the circumstances, the possibilities of spill-over effects from testimony of these transactions are patent when the number of conspiracies, the number of defendants and the volume of evidence are weighed against the ability of the jury to give each defendant the individual consideration out system requires. United States v. Bertolotti, supra.

The introduction of testimony regarding James Panebianco as a supposed, alternate source of narcotics for the Manfredonia operation puts to lie the Government claim that the evidence established a single conspiracy. The testimony is devoid of any evidence that Panebianco participated in the ongoing conspiracy or was even aware of the alleged extent of the conspiracy. The solitary transaction in which Panebianco is involved with Manfredonia involved a quarter kilogram, whihc amount though not small was hardly indicative of a large and pervasive conspiracy.

Because of the inherent dangers of the "spillover" effect and the likely transference of guilt, the Appellant

was denied a fair trial and the denial of a severance by the trial court constituted error requiring reversal of the conviction.

POINT III

THE COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A SEVERANCE PURSUANT TO RULES 8(b) and 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The Appelant moved, prior to trial, for a severance pursuant to Rules 8(b) of the Federal Rules of Criminal Procedure requiring the Government to elect the Count or Counts upon which it wished to proceed to trial. The motion was denied. The motion for severance was renewed during the course of the trial and was again denied. This was error and the judgment of conviction should be reversed. United States v. Kelly, 349 F.2d 720 (2nd Cir. 1965); Drew v. United States, 331 F.2d 85 (C.A.D.C. 1964); Kotteakos v. United States, 328 U.S. 750 (1946).

At the outset of this case, the Appellant moved for a severance arguing that there had been improper joinder as to the various defendants. This motion was renewed at the end of the Government's case as well. In the instant case, one conspiracy was alleged naming 13 defendants and 12 unindicted co-conspirators. The indictment* consisted of twenty-three counts, including the general conspiracy count. The Appellant was named in the conspiracy count and in count Thirteen involving a substantive offense.

In Kotteakos v. United States, supra, 328 U.S. at 767, the Supreme Court said:

> "The burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate."

* The original indictment 75 Cr. 170 contained fourteen counts; the Appellant was not named at all in that indictment.

In the course of the testimony of the Government's principal witnesses, Mary Mobley and Joseph Manfredonia, the Government's theory of the case unfolded. The Government contended that Lawrence Iarossi and Joseph Manfredonia were partners and the originators of the alleged ongoing conspiracy. The testimony clearly discloses that Iarossi's participation in the conspiracy terminated in 1970, albeit involuntarily, and that Manfredonia withdrew completely from the narcotics trade from March, 1970 until October, 1970, of his own volition.

The Government argues , but does not prove, that the subsequent involvement of Manfredonia with his new partner, Joseph Barone, was merely a continuation of the original conspiracy. Such reasoning flies in the face of logic since a conspiracy, defined as a partnership, necessarily ceases where the partners terminate their alliance. The Government failed to establish that the alleged conspiracy maintained any ongoing activity during the period from March to October of 1970.

The only common feature between the prior conspiracy and the latter conspiracy extending from late 1970 until 1973 was that narcotic distribution was allegedly involved. Manfredonia's source of supply changed (Panebianco being mentioned for the first time) and Manfredonia stated that he engaged in flim-flams during this period of time.

Manfredonia's own testimony belies the argument that the Appellant was involved in any way with the Iarossi-Manfredonia conspiracy. Brooks is injected by Manfredonia, almost as an afterthought, as a sometime customer of Barone. It is noteworthy that Manfredonia was never present when Barone supposedly delivered drugs to Brooks. Manfredonia never witnessed

an actual drug transaction involving Brooks.

Also interesting is the fact that none of the agents who testified regarding the surveillance of Barone ever encountered the Appellant, Mr. Brooks. The most logical explanation for the agents lack of awareness of Mr. Brooks is simply that no such transactions involving drugs between Barone, Murray and Brooks ever took place. Curious too is the fact that Murray the supposed "bag" man for Barone's drug operation never made a delivery to Brooks and did not even encounter Mr. Brooks for almost four years between 1971 and early 1975. Such a situation is materially inconsistent with the Government's contention that Brooks was involved in an ongoing conspiracy.

This case is materially different and easily distinguishable from United States v. Sperling, 506 F.2d 1323 (1974), where a single large conspiracy to distribute enormous quantities of cocaine and heroin was alleged and proved. In Sperling, it was established that the two principals, Pacelli and Sperling had interlocking networks for the sale and distribution of cocaine. Pacelli supplied cocaine for resale to Sperling's customers and Sperling, in turn, provided heroin for resale to Pacelli's customers.

Mr. Justice Jackson, in his concurring opinion in Krulewitch v. United States, 336 U.S. 440,454 (1949) wrote:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

The inclusion of names like Vincent Papa, whom the press has

characterized as the kingpin of narcotics trafficking, without establishing any substantial link to the Appellant or the other defendants on trial, served to impart an aura of illegality even where the evidence was sparse or non-existing.

Clearly the strength of the Government's case was substantially stronger against other defendants than against the Appellant Brooks. Under the circumstances, the refusal of the Trial Court to order a severance either under Rule Eight or Fourteen of the Federal Rules of Criminal Procedure as to the Appellant was so prejudicial as to require reversal of the judgment of conviction.

POINT IV

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT BROOKS HEREBY ADOPTS THE POINTS AND ARGUMENTS OF THE OTHER APPELLANTS INSOFAR AS THEY MAY HAVE APPLICATION TO THE APPELLANT, BROOKS.

CONCLUSION

For the above-stated reasons, the Judgment below should be reversed and the case remanded to the District Court with a direction that the indictment be dismissed as to the Appellant or, in the alternative, that the Appellant be granted a new trial.

Respectfully submitted,

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